

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

In re: CEDIC DEVELOPMENT
COMPANY,
Debtor.

CEDIC DEVELOPMENT

COMPANY,
Appellee.

v.

RONALD E. WARNICKE;
THOMAS LITTLER,
Appellants.

Appeal from the United States District Court
for the District of Arizona
Earl H. Carroll, District Judge, Presiding

Argued and Submitted
July 5, 2000--San Francisco, California

July 26, 2000

Before: John T. Noonan, Sidney R. Thomas, and
Marsha S. Berzon, Circuit Judges.

Opinion by Judge Noonan

No. 99-15841

D.C. No.
CV-98-00636-EHC(PHX)

OPINION

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COUNSEL

Thomas E. Littler, Mark J. Giunta, Warnicke & Littler, Phoe-

nix, Arizona, for appellant Warnicke & Littler.

Chester J. Peterson, Lerch, McDaniel & Deprima, Phoenix,
Arizona, for debtor-appellee Cedec Development Co.

OPINION

NOONAN, Circuit Judge:

Warnicke & Littler (the Firm) appeals the district court's denial of \$10,000 additional attorneys fees in its representation of the bankrupt debtor, Cedec Development Co. (Cedec). We hold that the basic rates charged by the firm did not take into account all relevant factors and that as adequate compensation the Firm was entitled to the \$10,000. We reverse the judgment of the district court.

FACTS

The following facts were found after trial before the bankruptcy court for the District of Arizona: On May 31, 1991,

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Cedec filed a voluntary petition in bankruptcy. On September 6, 1991, Dillingham, Kelip & Cross was appointed as its counsel. Five months later this law firm moved to withdraw for failure by Cedec to pay its approved fees; the motion was granted. On March 24, 1992, Ted A. Smith was approved as counsel, but he, too, moved to withdraw; on August 12, 1992, the motion was granted.

For nearly a month Cedec looked for a new lawyer. The bankruptcy court informed Cedec that any new counsel would not be permitted to withdraw. Cedec persuaded the Firm, which was experienced in complex bankruptcy cases, to take its case with a contract that provided Cedec would pay its rates ranging from \$125 per hour for an associate to \$210 per hour for the senior partner. The rates were below the market rates for bankruptcy counsel with experience comparable to that of the Firm. The contract further specified that the total fee would be adjusted, upward or downward, at the discretion of the Firm, depending on ten enumerated factors such as the magnitude of the matter and the results achieved as well as on other considerations that might arise in the course of the case.

The Firm was paid a retainer of \$5,000, an amount substantially less than other lawyers in the Phoenix area would have asked for under the circumstances. On September 24, 1992, the bankruptcy court approved the agreement.

Thereafter, the Firm successfully represented the bankruptcy in complex litigation to recover property which had been sold at a Trustee's Sale and further arranged financing to save Cedec's interest, ultimately leading to a benefit of \$293,541.21. The Firm also successfully represented Cedec in preventing foreclosure on property in which Cedec had an equity of \$100,000. The Firm also provided a variety of other legal services to the debtor's benefit.

PROCEEDINGS

The Firm made two interim applications for fees, which were approved by the bankruptcy court and paid by Cedec. On

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February 3, 1994, it filed a third application, asking for what it described as an amount based on a lodestar of \$33,203 and an enhancement of \$29,354.12. The bankruptcy court awarded the sum designated as the lodestar amount plus an enhancement of \$10,000.

Cedec appealed the award of the enhancement to the Bankruptcy Appellate Panel (the BAP). The BAP remanded for a hearing on whether the enhancement was justified.

On remand, the bankruptcy court conducted a trial and made the findings of fact set out above. The bankruptcy court concluded that the hourly rates charged by the Firm did not take into account all the factors set out to determine the lodestar according to Kerr v. Screen Extras Guild, Inc., 526 F.2d 67 (9th Cir. 1975), that the rates did "not take into account the results obtained and/or the risk of nonpayment," and that an enhancement of \$10,000 was necessary to provide reasonable compensation.

Cedec again appealed, this time to the district court. The district court held that "the lodestar amount was properly calculated as being \$33,203." The court interpreted City of Burlington v. Dague, 505 U.S. 557 (1992), to bar an enhancement "based on the risk of nonpayment." The district court concluded that the bankruptcy court had abused its discretion.

The award of \$10,000 was vacated.

The Firm appeals.

ANALYSIS

As did the district court, we determine whether the bankruptcy court abused its discretion in the award of the \$10,000. Kord Enterprises II v. California Commerce Bank (In re Kord Enterprises II), 139 F.3d 684, 686 (9th Cir. 1998). It did not.

City of Burlington is a case about contingent fees. It holds that the risk created by a contingency fee does not jus-

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tify an increase beyond the lodestar. 505 U.S. at 565. The case is not controlling here, because the risk of nonpayment by Cedec was not created by any contingency in the merits of the litigation but by the conduct of Cedec that suggested that it didn't like to pay its lawyers. Moreover, City of Burlington was addressed to a federal "fee shifting statute." Id. at 561-562. This case does not involve fee-shifting but the payment by a client of the fee charged it by its own lawyer. We have recognized that the general principles applicable to fee-shifting statutes "may require some accommodation to the peculiarities of bankruptcy." Burgess v. Klenske (In re Manoa Financing Co., Inc.), 853 F.2d 687, 691 (9th Cir. 1988). Moreover, the district court's premise that the hourly rates set by the Firm would indicate the lodestar amount was incorrect. The rates were bargain rates not incorporating the Kerr factors. Not to allow the \$10,000 enhancement would be to pay below the lodestar.

For these reasons, the judgment of the district court is REVERSED and the judgment of the Bankruptcy Court is REINSTATED.

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